

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION SIX**

FOREST CITY STATION SQUARE ASSOCIATES,
INC.

Employer

and

Case 6-RC-11842

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 95-95A, AFL-CIO¹

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Suzanne C. Bennett, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.²

Upon the entire record in this case,³ the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The names of the Employer and of the Petitioner appear as amended at the hearing.

² Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by July 25, 2000.

³ The Employer and the Petitioner filed timely briefs in this matter which have been duly considered by the undersigned.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(l) and Section 2(6) and (7) of the Act.

The Petitioner seeks to represent a unit consisting of all full-time and regular part-time general maintenance employees employed by the Employer at the Shops at Station Square; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act. The Employer argues that the petitioned-for unit is inappropriate in that it includes employee Larry Janicki, whom the Employer contends is a locksmith and as such is a guard within the meaning of Section 9(b)(3) of the Act. Without the inclusion of the alleged guard, the Employer agrees that the petitioned-for unit is an appropriate unit. The Employer further contends that the petition should be dismissed because an election would be inappropriate at this time inasmuch as the Employer intends to subcontract the operation in which the petitioned-for employees are employed. There are eight employees in the petitioned-for unit, including three maintenance mechanics (including the alleged Section 9(b)(3) guard), one maintenance employee and four groundskeepers. There is no history of collective bargaining for any of the employees involved herein.

The Employer, a Pennsylvania corporation, is engaged in the management and operation of office buildings. The Employer is a subsidiary of Forest City Commercial Management, which is headquartered in Cleveland, Ohio. Solely involved herein are the Employer's operations at Station Square, a retail and office complex located in Pittsburgh, Pennsylvania.

The Employer's General Manager, Eve Bursic, is responsible for overseeing the day to day operations of the property, protecting the Employer's interests at the site, and developing and submitting a budget to the corporate office. Bursic oversees the approximately seventeen employees of the Employer working at Station Square. These employees include the eight

petitioned-for unit employees, Assistant General Manager Amy Savarese, Operations Construction Manager Adam Daniel Patinski, Director of Security Bill Thomas, a human resources representative, a director of marketing, a marketing coordinator, an office assistant and an intern.⁴ Patinski directly supervises all of the employees in the proposed unit.

The Employer owns approximately 54 acres of property along the Monongahela River in Pittsburgh, Pennsylvania. Situated on that property are an office tower structure known as the Landmarks Building which houses offices; the Freight House Shops which contain retail stores; a building known as the East Warehouse which houses several businesses; various parking lots including a parking garage; and several other buildings and access roads within the property. Also located on or abutting the property is the Sheraton Station Square Hotel, the Commerce Court office tower, the former Lawrence Paint Building, a gas station and a building called "the Gatehouse." The unit employees perform work in the Landmarks Building, the Freight House Shops, the East Warehouse, and the parking garage, as well as in the parking lots, common areas and access roads within the property.

The three maintenance mechanics, Rich Stehle, Mike Pajewski and Larry Janicki, perform routine maintenance in and around the property. Janicki also performs locksmith duties, which take up approximately five percent of his workday. The maintenance employee, Bob Meyers, works exclusively in the Landmarks Building. The four groundskeepers, Joe Frazier, Dave Napierkowski, John Salter and Lewis Jones, primarily work outdoors throughout the property, performing routine maintenance including pothole patching, landscaping and clean-up duties. The unit employees primarily work Monday through Friday from 7:00 a.m. until 3:30 p.m., with the exception of Napierkowski who works from 1:00 p.m. until 8:30 p.m. and Jones who works part-time.

⁴ At the hearing the parties stipulated, and I find, that Bursic, Savarese and Patinski are supervisors within the meaning of Section 2(11) of the Act inasmuch as they have the authority to hire, fire and discipline employees, and they are therefore ineligible to vote in the unit found appropriate herein.

Supervisor Patinski testified that Janicki spends about five percent of his workday performing locksmith duties. These duties include re-keying locks, cutting keys, changing, repairing and reopening locks. Janicki and the other maintenance mechanics carry master keys to the property. These keys do not allow access to the individual shops in the Freight House. The key machine currently used requires no special training and is similar to key machines operated by clerks at local variety and hardware stores. Patinski testified that an employee of PPG Corporation has given him the option to buy PPG's old key code machine, once that individual is satisfied with a new key code machine. Patinski was vague as to when this purchase would be made.

Patinski testified that, should the Employer purchase this machine, he intends to have Janicki re-key the entire property. At that time, for a period of three to six months, Janicki would spend a significant amount of his work time performing locksmith duties. As part of these duties, Janicki would keep records of all of the key codes. The re-keying would not include the store access doors, as those doors are the responsibility of the tenants.

Patinski testified that he considers Janicki to be a guardian of the property of the tenants and of the Employer because he is in charge of keying the property and because he is responsible for making sure that the locks work on the property. The Employer did not provide any evidence that Janicki performs any traditional security guard functions. In fact, the Employer contracts for security guards from an outside firm which specializes in such work. Patinski does not supervise the security guards; rather, the Employer's Director of Security, Bill Thomas, supervises them.

The maintenance mechanics primarily perform routine maintenance work, along with some limited electrical, carpentry, painting, and plumbing work. Supervisor Patinski testified extensively regarding his unhappiness with the skill level of these employees, including their inability to construct buildings or perform extensive HVAC work. A review of the job description for these employees does not confirm the intimation of Patinski's testimony, that the employees

are expected to perform such skilled work. Rather, the job description indicates that the employees are expected to perform basic maintenance duties.

Patinski testified that because of the lack of skills of some of the unit employees, he has been forced to outsource many jobs, including the construction of the Pittsburgh Visitor's Bureau Information Center, plumbing, and HVAC work. Because of his frustration with the skill level of his employees, he began to discuss outsourcing all of the maintenance and groundskeeping work, thus eliminating all of the positions in the petitioned-for unit. He first began discussing this with other management employees of the Employer in about the summer of 1999. On about April 4, 2000, the Employer received a bid from an unnamed company to supply HVAC, Plumbing, Electrical, and Maintenance Helper/Landscaper employees. According to Patinski, no decision has been made, but contracting out this work is still under consideration.

General Manager Bursic testified that she has been employed at Station Square for about four years. During that entire time, both the Employer and its predecessor contracted out skilled maintenance work. She testified that subcontracting the work of the entire unit had been considered, that a contractor had been contacted in about late February or early March, 2000, that the contractor bid on the work but was not able to supply the Employer's staffing needs, and that the Employer has not sought any additional bids since that time. She testified that it is her understanding that Patinski was satisfied with the progress being made by the unit employees in the performance of their duties and that she has not made a final decision on whether to contract out the work.

As noted, the parties are essentially in accord as to the appropriateness of the petitioned-for unit except that the Employer, contrary to the Petitioner, would exclude maintenance mechanic Larry Janicki as a guard within the meaning of Section 9(b)(3) of the Act. In addition, the Employer argues that the petition should be dismissed due to the Employer's imminent intent to cease directly providing the services performed by the employees in the petitioned-for unit.

The Board has consistently held that when an employer's cessation of operations is imminent and certain, it would not effectuate the policies of the Act to conduct an election for the purpose of determining the employees' bargaining representative. Hughes Aircraft Company, 308 NLRB 82 (1992); Larson Plywood Company, Inc., 223 NLRB 1161 (1976); Plum Creek Lumber Co., Inc., 214 NLRB 619 (1974). However, if an employer's plans appear speculative, the Board will direct an immediate election. See, e.g. Hazard Express, Inc., 324 NLRB 989 (1997); Canterbury of Puerto Rico, Inc., 225 NLRB 309 (1976); National By-Products Company, 122 NLRB 334 (1958).

In the present case, the Employer has failed to provide specific evidence to establish that it has a definite plan to subcontract the work of the bargaining unit either now or in the future. Rather, it has provided evidence of an entirely speculative plan that is hardly worthy of consideration. The Employer provided testimony that it has considered subcontracting unit work, that it sought and obtained a bid for the subcontracting of unit work, that it rejected that bid, and that it has sought no further bids for such work. Moreover, the record reveals that the Employer has no current plan to seek further bids, and that it has made no final decision to subcontract for the work performed by the employees in the petitioned-for unit.

The Employer's actions are far removed from the cases cited in its brief. In Hughes Aircraft, supra, as of the date of the pre-election hearing, the Employer had made a final decision to subcontract, had bid the job to seven subcontractors, had signed an agreement with two outside contractors to perform the unit work, and had given notice of permanent layoff to the unit employees. None of the actions taken by the employer in Hughes Aircraft have been taken by the Employer in the present case. In Davey McKee Corp., 308 NLRB 839 (1992), the Employer provided evidence that the work of the employees in the proposed unit was terminating only 29 days after the close of the pre-election hearing, thus clearly evidencing the imminent cessation of operations. In the present case, as of the date of hearing, there had not even been a decision made regarding subcontracting.

Similarly, in Douglas Motors Corp., 128 NLRB 307 (1960), as of the date of hearing the Employer had already put its subcontracting plan into operation by executing contracts for certain work, and was in the process of negotiating subcontracts for the remainder of its production operations. No such contracts have been negotiated or signed in the present case. Similarly, in Clark Construction Co., 129 NLRB 1348 (1961); Plum Creek, supra; and Larson, supra, change to the units therein was indisputably imminent, with projects ending within short fixed periods of time. Moreover, in Larson, a decision to liquidate the entire company had already been made by its Board of Directors, and the closing was set for a time certain. The Employer herein has failed to establish the existence of any plan, let alone an imminent plan, for the cessation of operations or the subcontracting of the unit jobs. Accordingly, I reject the Employer's argument that the petition should be dismissed on this basis.

The Employer further argues that Larry Janicki, a maintenance mechanic whose work includes running the key cutting machine, is a guard within the meaning of Section 9(b)(3) of the Act. Section 9(b)(3) of the Act precludes the Board from including in a unit together with other employees "...any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises...." The intent of Congress in enacting Section 9(b)(3) was "...to insure to an employer that during strikes or labor unrest among his other employees, he would have a core of plant protection employees who could enforce the employer's rules for protection of his property and persons thereon without being confronted with a division of loyalty between the employer and dissatisfied fellow union members." McDonnell Aircraft Corporation, 109 NLRB 967, 969 (1954).

The Employer, in its brief, relies primarily upon the Board's decision in A.W. Schlesinger Geriatric Center, Inc., 267 NLRB 1363 (1983). The Employer's reliance is misplaced. In Schlesinger, two maintenance employees were found to be guards within the meaning of the Act where they were responsible for assuring the safety of employees arriving at and leaving the facility, locking and unlocking doors to the facility, patrolling the facility's parking lot to insure that

it was well lit, making hourly rounds of the facility, handling disturbances and reporting infractions of the Employer's rules. Moreover, no other security personnel were on the premises.

The Employer's reliance on the Board's decision in MGM Grand Hotel, Las Vegas, 274 NLRB 139 (1985) is also misplaced. In that case, the employees found by the Board to be guards within the meaning of the Act operated the Employer's sophisticated life-safety system which encompassed many functions, including significant security functions. The employees in MGM worked closely with other guards and reported possible security problems and infractions. Similarly, in the more recent Board decision in Rhode Island Hospital, 313 NLRB 343 (1993), employees were found to work as Section 9(b)(3) guards where they maintained traffic control, enforced the Employer's rules including no parking and no smoking, made rounds of the facility, conducted identification checks and worked with other guards.

In the present case, the Employer has failed to provide any evidence that Janicki performs any Section 9(b)(3) guard duties. Janicki has no role in protecting persons or property. He merely cuts keys if needed. Unlike the maintenance men in Schlesinger, he does not even lock and unlock the doors of the facility. The Employer provided no evidence that Janicki has any role in enforcing the Employer's rules and regulations against other employees or against the public. Further, the record reveals that the Employer utilizes a private security guard service at the facility. Bill Thomas, the Employer's Director of Security, supervises the security guards. The Employer did not provide any evidence of interaction between Janicki and security guards or between Janicki and Thomas. Further, there is no contention or evidence that the Employer would use Janicki during a strike of its employees to augment the security patrols. BPS Guard Services, Inc., 300 NLRB 298, 301 (1990).⁵ Thus, I find that the Employer has failed to establish that maintenance mechanic Larry Janicki is a guard within the meaning of

⁵ The Employer contends that Janicki's duties will expand with the purchase of a new key cutting machine. However the purchase of such a machine is speculative. Even if the machine is purchased, and Janicki, for a brief period of time, has additional duties preparing keys for much of the Station Square property, such duties would not constitute work within Section 9(b)(3) of the Act.

Section 9(b)(3) of the Act. Accordingly, his position shall be included in the unit found appropriate herein.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time general maintenance employees employed by the Employer at the Station Square complex in Pittsburgh, Pennsylvania; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit set forth above at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.⁶ Eligible to vote are those employees in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date,

⁶ Pursuant to Section 103.20 of the Board's Rules and Regulations, official Notices of Election shall be posted by the Employer in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. As soon as the election arrangements are finalized, the Employer will be informed when the Notices must be posted in order to comply with the posting requirement. Failure to post the Election Notices as required shall be grounds for setting aside the election whenever proper and timely objections are filed. The Board has interpreted Section 103.20(c) as requiring an employer to notify the Regional office at least five (5) full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.

and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁷ Those eligible shall vote whether or not they desire to be represented for collective bargaining by International Union of Operating Engineers, Local 95-95A, AFL-CIO.

Dated at Pittsburgh, Pennsylvania, this 11th day of July 2000.

/s/Gerald Kobell

Gerald Kobell
Regional Director, Region Six

NATIONAL LABOR RELATIONS BOARD
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⁷ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc. 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is hereby directed that the election eligibility list, containing the full names and addresses of all eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, Room 1501, 1000 Liberty Avenue, Pittsburgh, PA 15222, on or before July 18, 2000. No extension of time to file this list may be granted, except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.